IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 191 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
VELJIBHAI VITTHALIBHAI BUTANI & 1 - Opponent(s)

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Appearance :
Mr.K.C.Shah,learned APP for Appellant(s) : 1,
None for Opponent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 18/09/2007

ORAL JUDGMENT

(Per : HON'BLE SMT. JUSTICE ABHILASHA KUMARI)

1. This appeal is preferred by the State of Gujarat under Section 378 of the Code of Criminal Procedure, 1973 against the judgment and order dated October 11,2004 rendered by the learned Additional Sessions Judge, 2nd Fast Track Court, Amreli in Sessions Case No.71 of 1997 whereby both the respondents came to be acquitted of the offences punishable under Section 302 read with Section 114 of the Indian Penal Code.

2. The case of the prosecution, in brief, is that the complainant Veljibhai Vithalbhai Butani, who is the respondent No.1 herein (original accused No.1) filed a complaint dated June 6, 1997 at 11 A.M. at Babra Police Station to the effect that on May 22,1997 he had gone to attend a function at the house of his brother and had stayed there at night. It is stated that the daughter of the complainant named Hansa, aged about 15 years, alongwith his two younger sons were asleep at home when the elder son of the complainant named Kishan came home and found that Hansa was missing from the house. According to the

narration in the complaint, the complainant returned home to search for Hansa and found that her clothes were also missing from the suitcase. Thereupon, the complainant went to Babra Police Station on May 23, 1997 to lodge a complaint to the effect that he suspected that one Koli Narsing Dadu belonging to the village of the complainant who was in the habit of abducting girls must have abducted his daughter. It is further stated that on June 6, 1997 at 11.0 A.M. the complainant was searching for Hansa in the Sim (boundary) of his village among the Baval trees when, at about 12 noon he heard a sound like a shout coming from a hut situated near a depression in the northern boundary of the field of Patel Limba Nathu. According to the complainant on his going to that place he saw his daughter Hansa, by whose side Narsing Dadu was sleeping. Then Hansa inflicted a blow with a knife on the stomach of Narsing Dadu. Upon this the complainant ran to the spot and gave a strong blow with a bamboo stick on the head of Narsing Dadu, due to which his head was broken. It is further narrated in the complaint that thereafter the complainant snatched the knife from the hands of Hansa and gave several knife blows with it on the face of Narsing Dadu, who died. The complainant goes

on to narrate that on the death of Narsing Dadu the complainant picked up the gun lying near Narsing Dadu, from under the thorn bushes. The complainant had sustained an injury on the thumb of his left hand while giving knife blows to the deceased, which was bleeding. The complainant further states that thereafter he went with his daughter Hansa, taking the gun of the deceased with him, to Babra Police Station and filed the complaint stating that he had caused the death of the deceased, who had abducted his daughter Hansa and on finding Hansa with the deceased he had done him to death. Upon this complaint, F.I.R. (Exh.35) was recorded vide Crime Register No.I-50 of 1997.

3. Upon the recording of the F.I.R., the investigation commenced. Statements of witnesses were recorded, panchanama of the scene of offence was prepared, inquest was held on the dead body, which was then sent for autopsy and all other necessary investigative procedure was carried out. At the end of the investigation, as sufficient incriminating evidence was found against both the accused, they came to be charge-sheeted before the learned Judicial Magistrate, First Class, Lathi-Babra. As the offences

under Section 302 read with Section 114 of the Indian Penal Code were exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the court of learned Sessions Judge, Amreli, where it came to be registered as Sessions Case No.71 of 1997. Learned Additional Sessions Judge, to whom the case was made over for trial, framed the charge on June 28, 2004, which is at Exh.3. The charge was read over and explained to both the accused, who pleaded not guilty to the same and claimed to be tried. Accordingly the accused were put to trial.

4. In order to bring home the guilt of the accused, the prosecution examined as many as nineteen witnesses and led oral as well as documentary evidence. After the recording of the evidence of the prosecution witnesses was over, the learned trial Judge explained to the accused the statements appearing against them and recorded their statements under Section 313 of the Code of Criminal Procedure,1973. The defence of the accused was to the effect that a false case had been foisted upon them. After hearing the parties and upon appreciation and evaluation of the evidence on record, the learned trial judge came to the conclusion that the

prosecution had not been able to prove its case beyond reasonable doubt. Accordingly the trial court acquitted both the accused of the offences with which they were charged, giving rise to the present appeal.

5. While appreciating the evidence on record the learned trial Judge came to the conclusion that the case against the accused rested upon circumstantial evidence and the prosecution had not been able to establish the chain of circumstances against the accused satisfactorily in order to establish that the accused persons, and none else, had committed the murder of the deceased. The learned trial Judge also came to the conclusion that the FIR recorded at the behest of the respondent No.1 who is also the complainant, is hit by Section 25 of the Indian Evidence Act,1872 and therefore, its contents cannot be read or used against either of the respondents (original accused). According to the learned trial Judge, if the contents of the F.I.R. are excluded from the evidence against the respondents, the chain of circumstances incriminating the respondents is not at all complete and there is no cogent or satisfactory evidence to bring home the guilt of the accused.

6. We have heard Mr.K.C.Shah, learned Additional Public Prosecutor for the appellant State at length and in great detail. We have also minutely perused the record and proceedings of the trial Court which had been summoned and is available with us. Mr.K.C.Shah has also provided extra copies of the evidence of the prosecution witnesses to the Court. At this stage also, we have undertaken a scrutiny of the vital features of the case, the reasonable probabilities arising out of the evidence recorded, and have deeply examined the reasons recorded by the trial court for recording the finding of acquittal. Mr.K.C.Shah, learned Additional Public Prosecutor has submitted that the judgment and order of acquittal impugned before us is contrary to law and the evidence on record. According to him, the trial court has failed to appreciate the deposition of P.W.1 Jivuben in a proper manner and has wrongly come to the conclusion that this witness has not actually seen the incident. According to Mr.Shah the version of the other prosecution witnesses, especially P.W.12, P.W.13 and P.W.19 has not been appreciated in its proper light by the trial court and had the same been done, the finding of acquittal could not have

been recorded. According to Mr.K.C.Shah, the learned trial Judge has erroneously come to the conclusion that the prosecution has failed to establish the case beyond reasonable doubt, especially in the light of the fact that accused No.2 Hansa had lodged the complaint in respect of rape supposed to have been committed upon her by the deceased, which is a strong circumstance against the accused. He has vehemently urged that the respondent No.1 has himself lodged the complaint and had gone to the Police Station in blood stained clothes, with a gun. He submitted that the portions of the complaint, which are not hit by Section 25, can be taken into consideration by the trial Court to prove the conduct of the accused under Section 8 of the Indian Evidence Act. Summing up his arguments, Mr.K.C.Shah has submitted that the chain of evidence implicating the accused persons and pointing only towards their guilt is complete and the appeal against the order of acquittal recorded by the trial court deserves consideration, admission and acceptance and, therefore, the appeal be allowed and the impugned judgment and order be set aside.

7. In order to ascertain whether a prima facie case is made out by the State for consideration and

admission of the appeal, it is necessary to undertake a thorough scrutiny of the evidence on the basis of which the trial Court recorded the finding of acquittal. We, therefore, consider it necessary to re-appreciate the evidence recorded during the trial in the light of the reasons recorded by the trial Court.

The essence of the evidence of the prosecution witnesses is summarized as follows:

8. P.W.1 Jivuben is the mother of the deceased and has been examined at Exh.9. Although reliance is placed by the prosecution upon the testimony of this witness, on a perusal of the same it is revealed that she is not an eye-witness of the event, although she states that her son has been done to death by the accused persons. P.W.1 states that at the time when she received the information about the death of her son she was at village Garani at the house of her daughter and her son Ramesh gave her the information, hearing which she returned home. She has stated in her examination-in-chief that accused persons used to keep her deceased son at their house and the accused No.2 used to call him frequently. In her cross-

examination by the defence, this witness has admitted that her son had gone away from home two-three days ago and she had no knowledge whether where he was on the day of the incident. Thereafter, this witness has stated that due to a complaint regarding misbehaviour with a woman, her deceased son never came home for the past three months, out of fear of the police. According to this witness she had gone to file a complaint at the Police Station regarding the murder of her son by the accused persons but the complaint was not taken and instead, the complaint filed by the respondent No.1 was registered. She has stated that the accused persons and their other family members are responsible for the murder of her son. However, this witness categorically admits that she does not know the respondent No.1 and neither has she even spoken to him. She has also denied that the respondent No.1 had ever come to her house. This witness has stated that her deceased son used to go secretly to the house of the accused persons, for which she had also scolded him. As is clear from the testimony of P.W.1, this witness is not an eye witness of the events and her testimony does not strengthen the case of the prosecution, inasmuch as it does not add any link to the chain of

circumstances to be proved against the respondents.

9. P.W.2, Kantigar Devgar, who has been examined at Exh.10, is one of the panch witnesses of the panchanama of the scene of offence (Exh.11) and of the inquest panchanama (Exh.12). He has not supported the case of the prosecution and has stated that he has been made to sign on a previously prepared panchanama regarding the scene of offence. He has also stated that Exh.11 was not prepared in his presence and he was called from his shop at the bus stand to sign the same. As regards Exh.12, the inquest panchanama, this witness states that he was made to sign this panchanama at his shop and the inquest panchanama has not been prepared at the spot where the dead body lay. This witness has been declared hostile to the case of the prosecution and was cross-examined by the learned Additional Public Prosecutor. In his cross-examination this witness has totally denied that the panchanama of the scene of offence (Exh.11) and inquest panchanama (Exh.12) were prepared in his presence.

10. P.W.3, Kanubhai Balabhai, whose testimony is at Exh.13, is the second panch witness of the

panchanamas at Exh.11 and Exh.12. He has also categorically denied that the said Panchanamas were prepared in his presence and has maintained that he was made to sign on the prepared panchanamas. He has denied that he went to the scene of offence or that the inquest panchanama was prepared in his presence. This witness has also been declared hostile by the prosecution and subjected to cross-examination. The testimonies of P.W.2 and P.W.3, do not prove the contents of both the panchanamas at Exh.11 and Exh.12. Moreover, the recovery of the blood stained clothes of the deceased from a bundle lying at the scene of offence as well as the clothes of accused No.2 from the spot, have been denied by these witnesses.

11. P.W.5, Naranbhai Ukabhai, examined at Exh.16, is one of the panch witnesses of the panchanama of the arrest of the accused persons, which is at Exh.15. The second panch witness of Exh.15 is P.W.6 Ameenaben Ishabhai, whose testimony is at Exh.17. P.W.5, Panch of the arrest of the respondents has denied that Exh.15 was prepared in his presence and has maintained that he was made to sign on a prepared panchanama. This witness has also been declared

hostile to the case of the prosecution and subjected to cross-examination. He has denied that the respondents were arrested in his presence or that the blood stained clothes of respondent No.1 were seized in the police station at Babra. His testimony is of no help to the case of the prosecution. P.W.6 Ameenaben Ishabhai, the second panch of the arrest of respondents has, although stated that when she was called at the police station a man and a girl were present there, who were put under arrest and that the blood stained clothes of the girl were seized in her presence but, she has denied that the girl present in the Police Station is the respondent No.2 present in the court. At this stage, this witness has also been declared hostile to the case of the prosecution and has been subjected to cross-examination. In the cross-examination this witness has totally denied that the blood stained clothes of accused No.2 were seized in her presence. In her cross-examination by the defence, P.W. Ameenaben Ishabhai has stated that she was made to sign on a prepared panchanama. Another Panch witness of Exh.15 is P.W.4 Nathabhai Dalpatbhai (Exh.14), who has also been declared hostile. The depositions of P.W.4, P.W.5 and P.W.6, collectively do not lend any support to the

panchanama of the arrest of the respondents at Exh.15, which is not satisfactorily proved.

12. Exh.19 is the panchanama of the seizure of the gun which is supposed to have been presented by the respondent No.1 in the Babra Police Station. P.W.7 Barkatali Jafarali (Exh.18) and P.W.8 Ravatbhai Rambhai(Exh.20) are the Panch witnesses of this Panchanama. Although these witnesses have admitted the signatures on the panchanama, they have denied any knowledge of its contents and have maintained that they have been made to sign on the panchanama, which had been previously prepared. Both these witnesses have been declared hostile by the prosecution.

13. Exh.23 is the Panchanama regarding taking of the blood samples of the respondents. P.W.9 Bhagubhai Shardulbhai is one of the panch witnesses of this panchanama. His testimony reveals that he does not support the case of the prosecution and has also been declared hostile.

14. P.W.10 Limbabhai Nathubhai, has been examined at Exh.24. He is the witness in whose field the

incident took place. He has stated that he owns 25 Bighas of land in Babra Taluka and he is an agriculturist. He has stated that he does not know how long ago the murder of the deceased took place. He has denied any knowledge that the dead body was found near the well in his field or that the police had questioned him regarding the same. This witness has maintained that he has never seen the deceased near his field and does not know that the deceased kept any weapon. However, he has stated that he knew respondent No.1 and heard that the deceased had abducted respondent No.2. This witness has denied that he had any knowledge about the murder of Narsing Dadu and has stated that although he recognizes respondent No.1 he does not recognize respondent No.2. This witness has been declared hostile by the prosecution and subjected to cross-examination. In his cross-examination he has denied any knowledge that the respondents have murdered the deceased near the well in his field.

15. P.W.11 Chanabhai Ukabhai, has been examined at Exh.25. He is the owner of the land adjoining the field of P.W.10. He has denied that he had seen the dead body of Narsing near the well in the field of

P.W.10 or any knowledge about who has murdered the deceased. This witness has also maintained that the deceased never came to his field and he has never seen a gun in the hands of the deceased. He has denied that he has ever given food to the deceased and has stated that on the day of incident he was not present in the village. This witness has also been declared hostile to the case of the prosecution.

16. P.W.12, Hamirbhai Dadubhai, whose testimony is at Exh.26, is the brother of the deceased and much reliance has been placed upon his testimony by the prosecution. According to this witness on the day of the incident P.W.10 Limbabhai Nathubhai was ploughing his field. As stated by this witness, at 9.0 A.M. on that day he went to the house of respondent No.1 and told him that if respondent No.2 and the deceased are found near the well in the field of P.W.10, he would call the police. According to him, respondent No.1 said he did not know anything. This witness has further stated that later on when he went to the hut where the deceased and respondent No.2 were hiding, he found that his brother Narsing was lying dead, having been killed by the respondents. This witness states that respondent No.1 had a knife in his hand

and respondent No.2 had an axe on her hand and having seen this witness coming there, they ran away. P.W.12 further states that thereafter he went home and informed his mother that the respondents had killed his brother. This witness states that his mother (P.W.1) went to lodge the complaint which was not registered by the police. In his cross-examination this witness has stated that two criminal cases were pending against his deceased brother, one of which was regarding the offence of rape and the second regarding the abduction of respondent No.2. According to this witness, he was working in a stone quarry near the spot where the incident took place at the relevant time. He states that on the day of incident he had gone for work near his field. He had denied that he has stated to the Police that the incident did not take place in the field of P.W.10.

17. P.W.13 Rameshbhai Dadubhai, who has been examined at Exh.27, is also a brother of the deceased. According to this witness, on the day of the incident when he was working in the field, there was shouting to the effect that murder has been committed. This witness states that the place where the incident took place is near the well, in the

field of Limba Nathu and that the respondents were hitting the deceased with a stick and an axe. This witness states that when he reached there, the respondents saw him and ran away. According to him the deceased had died on the spot and, thereafter, he went home to inform his mother, who had gone to Garni village. Thereafter, the body was taken to Hospital. In the cross-examination by the defence, nothing fruitful has been elicited from this witness. As is seen from the testimonies of P.W.12 and P.W.13, both brothers of the deceased, each is posing as an eye witness to the incident and each has described the incident in a different manner. P.W.12 states that when he went to the hut where the deceased and the respondent No.2 were hiding, he found his brother lying dead and the respondent No.1 had a knife in his hand and the respondent No.2 had an axe in her hand and they ran away on seeing P.W.12 coming there. P.W.13, who also poses as an eye witness, gives a different version and says that when he went to the spot he saw the respondents giving stick and axe blows to the deceased and on seeing this witness, both the respondents fled away. The versions given by P.W.12 and P.W.13 would indicate that both these witnesses came to the spot when the respondents were

in the process of giving the fatal blows to the deceased. However, neither of them states that the other witness was also present at the spot at the relevant point of time. P.W.13 states that the respondents were beating the deceased with sticks and an axe, but who was wielding the stick and who was wielding the axe, has not been stated. P.W.12 states that he saw the respondent No.1 with a knife in his hand and respondent No.2 with an axe in her hand but does not mention either of them giving blows with sticks to the deceased. These material contradictions in the testimonies of these two witnesses (P.W.12 and P.W.13) cast grave doubt on the theory that they were eye witnesses to the incident.Further the prosecution case as has been disclosed through the cross-examination of P.W.12 and P.W.13 by defence and through the deposition of Investigating Officer P.W.19, who is examined at Exh.36, it is established beyond doubt that none of the prosecution witnesses Nos.12 and 13 was the eye witness of the incident. Though P.W.12 in his examination-in-chief deposed that witness went to the hut, where deceased and accused Hansa had concealed themselves and noticed that his brother had died on account of injuries and both the accused with knife and axe with them were

present near dead body of deceased and noticing the witness both accused ran away, but when the witness No.12 was confronted in cross-examination about his this deposition with the statement he offered before Investigating Officer under Section 161 of the Code of Criminal Procedure, the witness replied that he had stated this fact before police. When we perused deposition of investigating officer i.e. P.W.19 Chunilal Ramjibhai Vandarvala(Exh.36) in para 9 of his deposition in cross-examination, Investigating Officer deposed that P.W.12 Hamirbhai Dadubhai did not state before him that the witness had been to the hut where deceased and accused were present and the witness had noticed that accused had killed his brother and when accused noticed witness coming to hut, they had run away. On the contrary, according to the deposition of Investigating Officer, P.W.12 Hamirbhai Dadubhai stated that he came to know about the incident through his wife Champa and Champa was informed by Babra Police about the murder of Narsing. He also stated before police that the family was not keeping any relation with deceased as his reputation was not good and refused the police to attend the police station to accept the dead body of his brother Narsing and that he even refused the police to visit

the scene of offence. Therefore, the falsity in deposition of this witness is rightly traced by the defence about he being an eye witness. Likewise in cross-examination of P.W.13 Rameshbhai Dadubhai, the witness admitted in his cross-examination by defence that he did not state before Investigating Officer that on account of shouting he went to the scene of offence because he was working in adjoining field. He witnessed that accused were beating his brother with sticks and axe. When he reached at the scene of offence, accused had run away on seeing the witness. Again in this respect when evidence of Investigating Officer is perused, in para 10 of deposition of P.W.19 Chunilal Ramjibhai Vandarvala(Exh.36) he deposed that P.W.13 Rameshbhai Dadubhai stated before him that reputation of his brother was not good and that he was staying separately from the family. He did not come to Babra nor visited the scene of offence. Thus, the statement of P.W.12 is duly contradicted by the defence in pursuance of Section 162 of the Code of Criminal Procedure and it is established that according to prosecution case he was not an eye witness of the incident while P.W.13 admitted in his cross-examination that he never stated before the police that he had witnessed the

incident and on noticing him that he was approaching to the scene of offence, the accused had run away. Both the witnesses, therefore, made major improvement in original prosecution case by posing themselves to be eye witnesses and the fact through the contradiction proved stands established that neither P.W.12 nor P.W.13 was the eye witness.

18. P.W.14 Shardaben is the daughter-in-law of the respondent No.1 and sister-in-law (brother's wife of respondent No.1). Her testimony, at Exh.28, is of no help to the case of the prosecution and she has been declared hostile. Similarly P.W.15 Vajiben, wife of respondent No.1, who has been examined at Exh.29, has also been declared hostile. The same is the case with P.W.16 Bhanuben, daughter of respondent No.1, who has been examined at Exh.30. This witness has also been declared hostile to the case of the prosecution.

19. Lastly, Dr.Nooruddin Rajabali Vindhani has been examined as P.W.17 at Exh.31. He has performed the post mortem on the body of the deceased and the post mortem report is at Exh.33. The cause of death is “head injury - injury to the brain, excessive hemorrhage followed by shock”.

20. P.W.18 Noormahammadbhai Osmanbhai Sama (Exh.34) is the P.S.O., who recorded the complaint of the respondent No.1 and P.W.19 Chunilal Ramjibhai Vandarvala (Exh.36) is the Investigating Officer.

21. This, in totality is the evidence of the prosecution.

22. The first vital feature of the case is that the respondent No.1 is himself the complainant and on his complaint, the F.I.R. was registered. The statements made in the F.I.R. (Exh.35) amount to a confession made to a Police Officer. In **Aghnoo Nagesia v. State of Bihar, AIR 1966 SC 119,** the law relating to confession made to a police officer in the course of investigation or otherwise and confession made while in police custody has been very succinctly laid down as under:

> "(9) Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in Ss. 24 to 30 of the Evidence Act and Ss. 162 and 164 of the Code of Criminal

Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in Ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides : "No confession made to a police officer shall be proved as against a person accused of an offence." The terms of S. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by S. 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by S. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by Ss. 24, 25 and 26. It

provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-s (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of S. 27 of the Evidence Act. The words of S.162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under S. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by S.27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under S.25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by S. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by S. 26, unless it is made in the

immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them.

(10) Section 154 of the Code of Criminal Procedure provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under S. 157 of the Evidence Act or to contradict him under S. 145 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under S.8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under S. 21 of the Evidence Act and is relevant, see Faddi v. The State of Madhya Pradesh, Cri.Appeal No.210 of 1963, dated 24-1-1964; (AIR 1964 SC 1850), explaining Nisar Ali v. State of U.P., (S) AIR 1957 SC 366 and Dal Singh v. King Emperor, 44 Ind App 137: (AIR 1917 PC 25). But a confessional first information report to a police Officer cannot be used against the accused in view of S.25 of the Evidence Act.”

Moreover, in paragraph 19 of the reported judgment, the Supreme Court has further enunciated that “Some of the decided cases took the view that if a part of the report is properly severable from the strict confessional part, then the severable part could be tendered in evidence. **We think that the separability test is misleading, and the entire confessional statement is hit by S.25 and save and except as provided by S.27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.”** (emphasis supplied). Keeping in view the principles laid down by the Supreme Court, which are squarely applicable to the facts of the present case, we are of the considered opinion that the F.I.R. made by the respondent No.1 is hit by Section 25 of the Indian Evidence Act and its contents cannot be read in evidence against either of the respondents.

23. The second important aspect to be considered is that this case rests upon circumstantial evidence. P.W.12 and P.W.13, who claim to be eye witnesses, have not actually witnessed the incident, as is evident from the glaring contradictions in their

testimony. It, therefore, becomes necessary to examine the evidence to determine whether it is sufficient to lead to a hypothesis of guilt of the accused persons, or not.

24. After excluding the F.I.R. from the chain of circumstances sought to be proved against the respondents since it is a confession made to a police officer, it remains to be seen what are the other remaining circumstances and whether they form a coherent link in the chain which points towards the guilt of the accused persons. We have carefully examined these circumstances which have been pointed out against the accused persons, as under:

(a) The first circumstance is that the respondent No.1 presented himself at Babra Police Station, with a gun in his hand, in blood stained clothes and gave the complaint. In view of the principles laid down in Aghnoo Nagesia v. State of Bihar (Supra) this circumstance cannot be taken into consideration against the accused persons.

(b)It is stated that the respondent No.1 came to the police station to give the complaint, in blood-

stained clothes, which were seized. However the recovery of the blood stained clothes has not been satisfactorily proved since all the Panchas of the Panchanama have turned hostile. The FSL report, at Exh.43, reveals that the clothes, which were sent for examination, contained human blood of the “B” Group. Nevertheless, it has not been conclusively proved that the clothes that were examined were those of the respondents. This circumstance, also, does not form a link in the chain of evidence against the accused persons.

(c) It is alleged that P.W.12 and P.W.13, both brothers of the deceased are eye-witnesses and have described the incident in their testimonies, and each of these witnesses has stated that they saw the respondents with weapons in their hands, giving blows to the deceased. However, as discussed hereinabove, their testimonies are contradictory and, therefore, do not inspire the confidence of the Court. Neither of these witnesses has stated anything regarding the presence of the other at the same spot, at the same time, which casts doubts on their veracity. Moreover, each of them gives a different description of the weapons wielded by the accused persons and each of

them states that on their coming to the spot the accused ran away. The material inconsistencies and contradictions in their testimony make it evident that they have not actually witnessed the incident. As discussed above, as per prosecution case itself, none of the witnesses P.W.12 and 13 was an eye witness of the incident. They posed themselves to be eye witnesses in major improvement to the prosecution case. The contradictions in this respect were confronted by the defence to each witness and proved through the evidence of Investigating Officer P.W.19. Therefore, no reliance whatsoever could be placed in any of the depositions of P.W.12 and 13. Similarly, the testimony of P.W.1,mother of the deceased also does not strengthen the case of the prosecution.

(d) The Panch witnesses of the panchanama of the scene of offence (P.W.11), inquest panchanama (Exh.12), panchanama of the arrest of the accused persons (Exh.16) and panchanama of seizure of blood stained clothes have all turned hostile and do not support the case of the prosecution. Similarly, P.W.10, in whose field the incident is supposed to have taken place and P.W.11 owner of the adjoining field and other prosecution witnesses have also not

supported the case of the prosecution. These circumstances also do not go against the accused persons.

25. According to the learned Additional Public Prosecutor, the statements made in the FIR by respondent No.1 can be taken into consideration to prove his conduct. However it has to be kept in mind that at the most, it can only be said that after excluding the confessional statements made by the respondent No.1 to the police, what remains may only give rise to a faint suspicion, but that, in itself, cannot be substituted for guilt. It is a cardinal principle of criminal jurisprudence that the prosecution has to prove the guilt of the accused beyond reasonable doubt when the offence alleged, as in the present case, is murder, which visits the perpetrator of the crime with a minimum sentence of imprisonment for life. A court of law should be justified in demanding full satisfaction regarding proof beyond reasonable doubt. In the present case, the materials on record relied upon by the prosecution are not sufficient to fasten the guilt on the respondents.

26. In a case based upon circumstantial evidence, the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, the chain of circumstances should be complete and there should be no gaps therein, in order to point towards the guilt of the accused. Further, the proved circumstances should be consistent only with the hypothesis of the guilt of the accused and should be totally inconsistent with his/her innocence. In **Padala Veera Reddy v, State of Andhra Pradesh and others, AIR 1990 SC 79** the Supreme Court has laid down certain tests which are necessary to be fulfilled when the case rests upon circumstantial evidence. These are:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
> (4) the circumstantial evidence in order to sustain conviction must be complete and

> incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

27. Taking into consideration the circumstances enumerated above and evaluating them in the light of the principles laid down by the Supreme Court, we are of the considered opinion that there are glaring gaps in the chain of circumstances, which do not establish a link consistent only with the hypothesis of the guilt of the accused and inconsistent with their innocence. The evidence on record, as discussed in detail hereinabove, is not sufficient to persuade us to come to a conclusion that it is the respondents and none else who have committed the offence. Even otherwise, it is a settled principle of law that in an appeal against an order of acquittal, if two views can be arrived at on the basis of the evidence on record, then the view favourable to the accused should be adopted, unless the judgment impugned is perverse, legally unsustainable or palpably wrong. In the present case, we find that the trial court has not committed any illegality in recording a finding of acquittal. The reasons given by the trial court

are cogent, plausible and probable in the facts and circumstances of the case. We find that the evidence has been properly appreciated and a correct conclusion has been arrived at.

28. In view of the aforesaid discussion, we do not find any merit in this appeal, even at this stage, and hence pass the following order:

Leave to appeal refused. Appeal stands dismissed.

(J.R.Vora,J)

(Smt.Abhilasha Kumari,J)

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